of non-impairment is erroneous. To be sure, the Petitioners vehemently disagree with this finding, and believe that a more balanced review of the evidence would support the same impairment finding that the FCC made for mass market customers. However, this issue will be addressed fully in the appeal on the merits, not at this preliminary stage.

Similarly, the Petitioners wish to emphasize that they strongly support the FCC's impairment determination for mass market UNE Platform customers. The Petitioners believe that the FCC's finding is well-supported by record evidence, and that any state commission review of relevant data in a nine-month proceeding will confirm the FCC's holding. The Petitioners also agree that a nine-month proceeding will give all parties and state commissions sufficient time to present relevant data. In this Petition, we compare the FCC's 90-day process for enterprise customers against the nine-month proceeding for mass market customers solely for the purpose of demonstrating the irrational severity of the 90-day process, not to question the procedures established by the FCC for mass market customers.

1. The TRO is Arbitrary and Capricious

The Petitioners are entitled to a stay of the enterprise customer prohibition on the ground that the 90-day procedure established by the FCC for presenting "granular" evidence of impairment to state commissions is analytically incoherent and, as a practical matter, illogical and self-contradictory. It is difficult to imagine a more deficient procedure that one that gives parties a truncated period of time to make a data-intensive showing yet denies them a critical input – in this case, the all-important customer and geographic market definitions – that the FCC has required them to utilize in order to meet their evidentiary burden. In particular, it is indefensible for the FCC to have the enterprise customer prohibition take effect automatically on December 31, 2003 unless there is a state commission decision to seek a waiver when the data necessary to determine whether to seek that waiver will not be finalized until June 27, 2004. Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. §706(2)(A) ("APA"), prohibits arbitrary and capricious agency decision-making and establishes a scheme of "reasoned decisionmaking."[13] Accordingly, "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."[14] The enterprise customer prohibition in the TRO falls well short of the minimum APA decision-making standard.

In addition, appellate courts in several cases have held that broad rules are unlawful when the agency does not provide parties with a meaningful "safety valve" to achieve a just result in specific circumstances. *E g , AT&T Wireless Services, Inc. v FCC*, 270 F.3d 959, 965 (D.C. Cir 2001); *Keller Communications, Inc. v. FCC*, 130 F.3d 1073 (D.C. Cir. 1997). As one Court has stated, the FCC's "discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). In this case, the FCC's enterprise customer prohibition is plainly overbroad, as even the FCC recognized that there may well be numerous market segments across the country where an impairment finding is warranted. TRO at ¶454. Hence, the FCC's enterprise customer prohibition is saved from being unlawfully overbroad only if the agency establishes a workable safety valve procedure. In this case, the 90-day procedure is an obviously deficient "safety valve" given that UNE Platform carriers and the state commissions do not have access to the critical market definitions necessary to prove their case according to the FCC's requirements. Similarly, the FCC's decision to permit, but not require, state commissions to conduct analyses within a 90-day period improperly compromises the ability of a UNE Platform

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13 *Allentown Mack Sales and Service, Inc v. NLRB*, 522 U.S. 359, 374 (1998).

14 *Id.*

carrier to vindicate its interest in obtaining an impairment finding for specific market segments.[15] The 90-day procedure does not even arguably qualify as a meaningful "safety valve," and therefore the FCC's enterprise customer prohibition is unlawfully overbroad.

It would be no answer were the FCC to suggest that a state commission, if it wanted to, might try to accelerate the process of defining the appropriate customer and geographic markets to permit the Petitioners and other UNE Platform carriers serving enterprise customers to make the required showing to preserve this customer segment within 90 days. The FCC gave the state commissions nine months because it found that time period to be necessary given "the expected difficulties and detailed information needed in conducting this inquiry." TRO at ¶451 n.1376. Particularly given the enormous demands on state commission resources under the TRO, it is simply not realistic or feasible for a state commission to make these market definitions within a month or two so that UNE Platform carriers can have a meaningful opportunity to present evidence to preserve their ability to provide local telephone service to enterprise customers prior to the end of the 90-day period.

Lastly, the Petitioners submit that numerous other deficiencies in the 90-day process compound the harm caused by the FCC's failure to synchronize the market definitions with the enterprise customer process. *First*, the FCC has allocated a mere 90 days to UNE Platform carriers to present evidence and state commissions to analyze that evidence while giving ILECs and state commissions a full nine months to present and analyze equally extensive data regarding mass market customers. TRO at ¶¶455, 460-63. The FCC neither explained nor justified this discriminatory treatment. The FCC's decision to give state commissions nine

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15 It is unclear whether the FCC would permit a UNE Platform carrier to submit a waiver petition directly to the FCC. The TRO does not expressly address the issue. However, given that the FCC has created this special 90-day procedure for obtaining an impairment finding for enterprise customers, the FCC may well refuse to consider a waiver petition that is filed directly with the FCC, thereby bypassing the state waiver process.

months to define the relevant customer and geographic markets is conclusive proof that 90 days is too short for UNE Platform carriers to have a meaningful opportunity to preserve their ability to serve enterprise customers.

Second, the FCC has required UNE Platform carriers to remove enterprise customers from UNE Platforms within 90 days after the rule goes into effect, while establishing a three-year transition phase for mass market customers when a state finds no impairment. TRO at ¶532. The FCC offered no explanation why enterprise customer migration would be easier to perform than mass market customer migration, and the Petitioners submit that the opposite is likely to be the case given the absence of any established "hot cut" process for the DS1 loops used by enterprise customers.

Third, the FCC has needlessly amplified the consequences of the 90-day process by limiting the ability of state commissions to revisit this issue at a later date. TRO at ¶ 455. The FCC offered no reason for this limitation. Given the resource problems facing many state commissions, it is reasonable to assume that many may not be able to review the issue according to the FCC's aggressive timetable. Further, in the context of mass market customers, the FCC is willing to permit state commissions to revisit the impairment finding as many times as they or interested parties want without imposing any such limitation. By giving UNE Platform carriers "one bite at the apple" (while giving ILECs multiple bites at the apple for mass market customers), the FCC has only magnified the prejudice to UNE Platform carriers from the FCC's failure to synchronize the timetable for market definitions with the 90-day procedural clock.

2. *The TRO Deprives Petitioners of Due Process*

The Petitioners are entitled to a stay of the enterprise customer prohibition on the ground that the 90-day procedure established by the FCC for presenting "granular" evidence of impairment to state commissions deprives the Petitioners of due process. The Supreme Court has explained that the "essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him ***and an opportunity to meet it.***'" *Mathews v Eldridge*, 424 U.S. 319, 348 (1976) *(quoting Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. at 171-71). Indeed, the "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Id.* at 333 *(quoting Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. at 168). Accordingly, the "fundamental requirement of due process is the opportunity to be heard '***at a meaningful time and in a meaningful manner.***'" *Id. (quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (emphasis added). Because the TRO denies the Petitioners the opportunity to be heard ***at a meaningful time and in a meaningful manner*** with respect to whether they are impaired without access to the UNE Platform to serve enterprise customers, the TRO deprives the Petitioners of due process.

The Supreme Court has emphasized that "'(d)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961), *cited in Mathews*, 424 U.S. at 334. As such, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), *cited in Mathews*, 424 U.S. at 334. Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *See Arnett v. Kennedy*, 416 U.S. 134, 167-68 (1974), *cited in Mathews*, 424 U.S. at 334. Specifically,

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private

> interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335. The decisive question is "whether the challenged procedures created a real risk of erroneous deprivation and whether additional procedures would have reduced that risk." *Metro County Title, Inc. v. FDIC,* 13 F.3d 883, 887 (5th Cir. 1994). The answer here is that the process for the enterprise market creates a real risk of erroneous deprivation that additional procedures would have reduced. With respect to the enterprise market prohibition, the answer is that consideration of these factors demonstrates that the administrative procedures of the TRO with respect to enterprise customers are not constitutionally sufficient.

As an initial matter, there can be no doubt that the Petitioners are in jeopardy of a serious loss Specifically, the Petitioners, like all carriers which rely on the UNE Platform to serve enterprise customers, stand to lose all of these customers immediately upon expiration of the 90-day period. Once these customers are gone, the business reality is that they are likely gone for good. Moreover, because the revenues from enterprise customers constitute a significant portion (up to 40% in some cases)[16] of the current revenues received by UNE Platform competitors in certain states, this loss may well threaten the continued ability of the Petitioners and other carriers which rely on the UNE Platform to survive.

Despite the undeniable impact that withdrawal of the UNE Platform will have on the Petitioners and other carriers which rely on the UNE Platform to serve enterprise customers,

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[16] Declaration of Sean Dandley, DSCI Corporation, at 2.

the administrative procedures established by the TRO deny the Petitioners the opportunity to be heard ***at a meaningful time and in a meaningful manner*** with respect to whether they are impaired without access to UNE Platform to serve enterprise customers. Specifically, although the record contained limited and incomplete data as to whether UNE Platform competitors are impaired with respect to enterprise customers, the FCC made a national finding of non-impairment. TRO at ¶¶451-58. The FCC freely concedes that its non-impairment finding may be incorrect, at least for certain market segments.[17] Therefore, the FCC created a procedural mechanism whereby UNE Platform carriers can present data to individual state commissions showing that they are impaired without access to ILEC-supplied local switching.

The procedural mechanism that the FCC created is so fundamentally flawed that it denies the Petitioners the opportunity to be heard ***at a meaningful time and in a meaningful manner***, which is crucial in light of the FCC's admission that its non-impairment finding in the TRO may be incorrect. Under this flawed procedure, state commissions are "permit[ted]" ***but not required*** to conduct an analysis to determine if impairment exists. TRO at ¶455. As such, the Petitioners will have ***no opportunity to be heard*** in every state where the state commission elects not to conduct an impairment analysis, as explicitly permitted by the TRO.

Even in states that elect to conduct an impairment analysis, additional fundamental flaws in the procedural mechanism deny the Petitioners the opportunity to be heard in a meaningful manner. As explained above, the FCC required state commissions that opt to review this issue to conclude that review within 90 days after the effective date of the TRO. *Id.*

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17 The FCC stated that "we recognize that a geographically specific analysis could possibly demonstrate that competitive carriers are impaired without access to unbundled incumbent LEC local circuit switching for DS1 enterprise customers in a particular market." TRO at ¶454. The FCC also recognized that UNE Platform carriers could suffer specific "cost and operational disadvantages" that could make it economic to serve enterprise customers only through ILEC-supplied local switching in certain market segments. *Id.*

Should a state commission determine that UNE Platform carriers are impaired without access to ILEC-supplied local switching for some enterprise customer market segment, the state commission must file a waiver petition with the FCC, and the FCC will then decide whether to modify its national impairment finding. *Id* In order to persuade a state commission to file a waiver petition with the FCC, the Petitioners will have to make a data-intensive showing, which inherently is based on relevant geographic market and customer definitions, to the state well before the December 31, 2003 deadline expires. However, the TRO requires state commissions to adopt the crucial market and customer definitions that will not be finalized until June 27, 2004 (and, as a practical matter, could not be developed any sooner). It is hard to conceive of a more deeply flawed procedure than one which forces parties to make a data-intensive showing in an extremely truncated time period yet denies them a critical input – in this case, the all-important customer and geographic market definitions – that the FCC has required them to utilize in order to meet their evidentiary burden. To make matters worse, once the 90-day deadline expires for enterprise customers, a state commission's ability to revisit the issue at a later date is constrained. *Id.* Because the enterprise customer prohibition will take effect automatically on December 31, 2003 unless the UNE Platform carriers present certain data based on geographic market and customer definitions that will not be finalized until June 27, 2004, the Petitioners have no opportunity to be heard ***in a meaningful manner***.

In any event, the flawed procedure denies the Petitioners the opportunity to be heard ***at a meaningful time***. The extremely truncated time period of 90 days is insufficient to permit the Petitioners to gather the type of data needed to demonstrate impairment under the newly announced impairment standard, particularly due to fact that crucial definitions for geographic market and customer classes have yet to be adopted. *Id* Moreover, regardless of whether a state elects not to conduct an impairment analysis or conducts an impairment analysis but finds no impairment, the Petitioners have only 90 days to migrate their enterprise customers from their UNE Platform networks. TRO at ¶532. As explained in more detail below, it will not be possible to accomplish this migration within 90 days, as the FCC recognized when it established a three-year transition plan for all other customers. Therefore, enterprise customers who receive services provided via the UNE Platform may experience service disruption and may no longer continue to have access to their telecommunications service if the Petitioners are unable to persuade a state commission voluntarily to undertake an impairment analysis, or if a state finds no impairment.

B. Petitioners Will Suffer Irreparable Injury if a Stay is Denied

Failure to stay the enterprise customer prohibition will cause enormous, immediate and irreparable harm to the Petitioners and to the competitive local telephone marketplace. Absent a stay, enterprise customers of the Petitioners that want to retain their existing service without risking service disruption will be forced to switch back to the ILEC. Most enterprise customers will not want to accept the risk of service interruption, and thus the Petitioners are in danger of losing their entire enterprise customer base.

This factor alone warrants grant of the requested stay. As the Supreme Court has observed, the

> Circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury from the premature enforcement of a determination which may later be found to have been wrong.

Scripps-Howard Radio, Inc v. FCC, 316 U.S. 4, 9-10 (1942). The FCC should also prevent irreparable injury from the premature enforcement of a determination which may later be found to have been wrong. The public interest in this case dictates that the FCC do so here by granting the requested stay.

1. Petitioners face the permanent loss of enterprise customers unless a stay is granted.

The Petitioners, like all carriers which rely on the UNE Platform to serve enterprise customers, stand to lose all of these customers immediately upon expiration of the 90-day period due to the enterprise customer prohibition. Specifically, the TRO mandates that UNE Platform carriers have only 90 days to remove all enterprise customers from the UNE Platform. TRO at ¶455.[18] As a result, Petitioners and other competitive carriers will no longer have access to the UNE Platform upon expiration of the 90-day period. Indeed, Verizon can be expected to begin raiding the Petitioners' existing enterprise customer base even before the 90-day period has ended. Once these customers are gone, the business reality is that they are likely gone for good.

The potential availability of resale provides no relief to the dilemma that the TRO creates for the Petitioners and other competitive carriers that currently rely on the UNE Platform to serve enterprise customers. Carriers that lease the UNE Platform lease the facilities used to provide service, which provides them with great flexibility to differentiate their service offerings from ILEC offerings. Indeed, the Petitioners and other carriers that rely on the UNE Platform have exploited this flexibility to offer unique packages of vertical services, local service areas

18 *See also* TRO at ¶532 ("Competing carriers must transfer their embedded base of DS1 enterprise customers to an alternative service arrangement within 90 days from the end of the 90-day state commission consideration period, unless a longer period is necessary to comply with a 'change of law' provision in an applicable interconnection agreement.").

that differ significantly from the ILEC's local service area, and customized billing and pricing options. By contrast, carriers that resell the ILEC's services have no ability whatsoever to differentiate their services from the ILEC's services on any other basis than price, which is less important to enterprise customers than other types of customers. Without the continued availability of the unique features which led the enterprise customers to choose a competitive carrier in the first place, enterprise customers will have little to no incentive to continue receiving service from a competitive carrier.

In any event, neither the Petitioners nor the other carriers which rely on the UNE Platform to serve enterprise carriers will be able to locate alternative facilities or service arrangements and implement necessary changes within 90 days. The FCC recognized that carriers need much longer than 90 days to transition away from unbundled network elements when it established a three-year transition plan for unbundled local switching. As the FCC explained,

> eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt the business plans of some competitors. This is especially unacceptable, given that the record contains substantial evidence – including cost studies *submitted by the incumbent LECs themselves* – that competitive carriers suffer cost disadvantages and other barriers when they self-deploy switching in some locations. There is also a need for an orderly transition to afford sufficient time for carriers to implement any necessary business and operational plans and practices to account for the changed regulatory environment, including the need to modify or revise their interconnection agreements. For example, competitive LECs may need to develop new UNE-L provisioning systems, including hiring, training, and equipping loop provisioning and switch technicians; purchase and collocate new equipment; create additional customer service and trouble maintenance groups; revise wholesale billing systems; and develop capabilities for E911 and local number portability.

TRO at ¶529. Petitioners and other carriers which rely on the UNE Platform cannot possibly complete these tasks within 90 days. Moreover, the ILECs' "hot cut capacity is limited by several factors, such as the labor intensiveness of the process, including substantial incumbent LEC and competitive resources devoted to coordination of the process, the need for highly trained workers to perform the hot cuts, and the practical limitations on how many hot cuts the incumbent LECs can perform without interference or disruption." TRO at ¶465. These capacity limitations led the FCC to conclude that "operational and economic barriers arising from the hot cut process create an insurmountable disadvantage to carriers seeking to serve the mass market, demonstrating that competitive carriers are impaired without local circuit switching as a UNE." TRO at ¶475. These same capacity limitations pose an insurmountable disadvantage to carriers seeking to serve the enterprise market, particularly because there is no hot-cut like process in existence today to migrate enterprise customers to non-ILEC switching. Therefore, enterprise customers who receive services provided via the UNE Platform may experience service disruption and may no longer continue to have access to their telecommunications service. TRO at ¶529 ("The most critical aspect of any industry-wide transition plan is to avoid significant disruption to the existing customer base served via unbundled local circuit switching so that consumers will continue to have access to their telecommunications service.").

The TRO places petitioners in a very real dilemma for which there is no adequate monetary or other remedy. Petitioners deal in a sensitive industry in which public confidence in their continued ability to provide telecommunications services is especially important. *See Abbott Laboratories v Gardner,* 387 U.S. 136, 153-54 (1967) (discussing relevance of customer sensitivity to balancing of equities in granting motions for stay). If consumers have any doubts about the continued ability of petitioners to provide telecommunications services, they will return to the incumbent local exchange carrier in order to avoid potential service disruptions or inconveniences that could hurt their own businesses. Enterprise customers who experience a service disruption due to the enterprise customer prohibition will blame their carrier, which will therefore lose that customer forever even if a Court eventually overturns the enterprise customer prohibition. In any event, courts have held that even a temporary exclusion from a market segment is irreparable harm. *Multi-Channel TV v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546 (4th Cir. 1994).

The Commission confirmed this phenomena in the TRO, noting that the "record shows that customers experiencing service disruptions generally blame their provider, even if the problem is caused by the incumbent." TRO at ¶467. Enterprise customers, which "are often more willing to pay for redundancy to protect against disruption," TRO at ¶467, are even more sensitive than other customers to service disruptions. The ILECs are fully aware of this, and thus they have the incentives, and, under the TRO, the ability, to undermine public confidence in the petitioners absent a stay of the TRO. There can be no question that in the present case that the regulation is directed at them in particular and that they will be exposed to the likely loss of all UNE-P customers if the TRO order is allowed to become effective on October 2, 2003. Indeed, ILECs can regain these customers immediately merely by making a software change. Moreover, denying UNE Platform carriers access to enterprise customers thus will adversely affect their ability to raise capital, expand the geographic scope of their operations, and invest in new facilities for years to come.

It is no answer to suggest that UNE Platform carriers could wait until the end of the 90-day period and then seek a stay if the state commission decides not to file a waiver petition. It bears emphasis that the FCC "permit[ted]" but did not require a state commission to conduct an analysis within 90 days. TRO at ¶455. Hence, a state commission is under no formal obligation to address this issue or, if it does so, to issue a final decision on whether to seek a waiver that could be subject to an appeal by the UNE Platform carriers. Moreover, a stay of the state commission's refusal to file a waiver petition would not prevent the FCC's enterprise customer prohibition from taking effect as scheduled on December 31, 2003. Once the 90-day period terminates without the filing of a waiver petition, the enterprise customer prohibition automatically becomes effective and the customer migration phase begins. TRO at ¶532. As such, adequate compensatory or other corrective relief will not be available at a later date. The only effective relief for the Petitioners is an immediate stay of the enterprise customer prohibition.

2. *Petitioners have no ability to recover monetary compensation for losses.*

The Petitioners will not have the ability to recover monetary compensation for losses caused by the enterprise customer prohibition from the FCC, Verizon, or any other party if a court eventually overturns the TRO. The revenues from enterprise customers constitute a significant portion (up to 40% in some cases)[19] of the current revenues received by UNE Platform competitors in certain states. The enterprise customer prohibition will immediately eliminate this revenue when it becomes effective, and thus the Petitioners will be immediately and irreparably harmed unless the requested stay is granted, because they may not be able to survive the revenue shock and even if they do, they will not be able to recover monetary compensation for the losses.

3. *The Petitioners effectively have no opportunity to gather and present evidence demonstrating impairment.*

The practical ability of UNE Platform carriers to participate in the state-by-state 90-day reviews by presenting evidence to preserve their ability to serve pre-existing and new

[19] Declaration of Sean Dandley, DSCI Corporation, at 2.

enterprise customers will be severely undermined absent a stay. As explained above, the TRO mandates that any impairment findings made by a state commission must relate to specific geographic and customer markets, yet the customer and geographic market determinations must be made by the state commission in the mandatory nine-month proceeding for mass market UNE Platform customers. TRO at ¶¶ 456-57. The FCC stated that due to "the expected difficulties and detailed information needed in conducting the [customer and geographic market] inquiry, we allow the states nine months to make this identification." TRO at ¶451 n.1376. Absent a stay, therefore, a UNE Platform carrier cannot reasonably be expected to present evidence to persuade a state commission to make an impairment finding for enterprise customers when the critical customer and geographic market definitions – which the FCC itself has required UNE Platform carriers to use when proving their case – will not be finalized until six months after the 90-period has closed. Given the FCC's holding that the 90-day procedure is the only opportunity for UNE Platform carriers to preserve their ability to serve enterprise customers under current industry conditions, TRO at ¶455, the Petitioners stand to permanently lose their ability to serve this critical market segment on a going-forward basis absent a stay because they will have no reasonable means for presenting the evidence necessary to demonstrate impairment.

C. There Will Be No Injury to Other Parties if a Stay is Granted

No other party would be harmed by stay of the enterprise customer prohibition. Indeed, apart from the Petitioners and other competitive carries that rely on UNE Platforms to serve enterprise customers, grant of the stay will only affect two groups of parties: (1) the enterprise customers who currently receive service from the Petitioners or other competitive carriers that rely on the UNE Platform; and (2) ILECs required by the FCC's current rules to make the UNE Platform available to enterprise customers.

The enterprise customers who currently receive service from the Petitioners or other competitive carriers that rely on the UNE Platform would not be harmed by stay of the enterprise customer prohibition. Indeed, these customers have already chosen to receive service from the Petitioners or other competitive carriers that rely on the UNE Platform to provide service rather than from the ILEC. As such, grant of the stay will benefit these enterprise customers by permitting them to continue receiving service from the service provider of their choice. Indeed, failure to grant the stay will harm these enterprise customers because they will no longer be able to receive service from the carrier of their choice.

The ILECs likewise would not be harmed by stay of the enterprise customer prohibition. Grant of the requested stay would require these ILECs to continue providing the Petitioners and other competitive carriers with access to the UNE Platform to serve enterprise customers during the pendency of the appeal. However, the ILECs would continue to receive TELRIC-based rates for all UNE Platform arrangements made available during this time. The current TELRIC-based rates in every state fully compensate ILECs for their costs, and these rates also provide the ILECs with a reasonable profit, as the FCC and the courts have reaffirmed repeatedly.[20] Moreover, as the Supreme Court has confirmed, the TELRIC rates do not raise any serious question with respect to the taking of property.[21] Accordingly, the ILECs will suffer no injury during the pendency of the appeal of the TRO order, which stands in stark contrast to the

20 Specifically, the current TELRIC-based rates are, as required by 47 U.S.C. §252(d)(1), "just and reasonable" rates based on "the cost of providing the . . . network element," which "may include a reasonable profit."

21 *Verizon Communications, Inc. v FCC*, 122 S. Ct. 1646 (2002) ("[The ILECs] seek to apply the rule of constitutional avoidance in saying that 'cost' ought to be construed by reference to historical investment in order to avoid a serious constitutional question, whether a methodology so divorced from investment actually made will lead to a taking of property in violation of the Fifth (or Fourteenth) Amendment. The Eighth Circuit did not think any such serious question was in the offing, 219 F.3d, at 753-54, and neither do we")

harm that, if the stay is not granted, will be suffered by the Petitioners, other competitive carriers who rely on the UNE Platform to serve enterprise customers, and the enterprise customers who receive service via the UNE Platform. Therefore, the equities weigh heavily in favor of grant of the stay.

D. The Public Interest Will Be Served by Grant of a Stay

The public interest dictates that the TRO be stayed during the pendency of the appeal. As explained above, Petitioners and all other carriers that rely on UNE-P to provide service to enterprise customers face enormous, immediate and unrecoverable loss absent a stay of the TRO. Grant of the stay will also ensure that customers have the right to choose between competitive carriers and incumbents while the appeal is pending. Indeed, by definition, the customers who will be impacted by the enterprise market prohibition have already chosen to receive service from a competitive carrier. Grant of the stay will merely ensure that these customers are able to continue receiving service from the carrier of their chose without service disruptions until the legal appeals of the TRO are resolved. By contrast, no parties will suffer harm if the FCC grants the requested stay. Therefore, the balance of the equities easily demonstrates that grant of the requested stay will serve the public interest because a stay will protect petitioners and other carriers that rely on the UNE Platform to serve enterprise customers, as well as the enterprise customers themselves, from irreparable harm without imposing new or untoward burdens on third parties.

IV. CONCLUSION

For the foregoing reasons, the Petitioners request that the Commission stay the enterprise market aspects of the Triennial Review Order pending judicial review.

Respectfully submitted,

Robert J. Aamoth
Genevieve Morelli
Todd D. Daubert
Michael Hazzard
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036
(202) 955-9600

Attorneys for the Petitioners

September 22, 2003

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Complainant Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)))	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)))	CC Docket No. 96-98
	)	
Deployment of Wireless Services Offering Advanced Telecommunications Capability	))	CC Docket No. 98-147

DECLARATION OF SEAN DANDLEY

1. I, Sean Dandley, am the CEO and President of DSCI Corporation ("DSCI").

2 The purpose of my declaration is to provide evidentiary support for the Emergency Petition for Stay filed jointly by InfoHighway Communications Corporation ("InfoHighway") and Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications ("MetTel"). This petition requests stay of certain portions of the *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (FCC 03-36) released in the above-captioned proceedings on August 21, 2003 (hereinafter "Triennial Review Order" or "TRO"). In this declaration, I will explain why failing to stay the enterprise customer prohibition will cause irreparable harm to DSCI. The lack of access to ILEC-provisioned unbundled local switching, in any geographic area, will severely affect DSCI's ability to provide competitive telecommunications services. Inaccessibility to ILEC-Provisioned unbundled local switching will be debilitating to DSCI's business strategy of providing ubiquitous, statewide service for our customers.

3. DSCI Corporation provides integrated communications solutions for its customers, with one bill and one source for all their telecommunications needs. DSCI provides a complete, customized communications solution for its customers by offering a full range of voice, Internet, data, network integration and monitoring services. DSCI relies heavily on the UNE Platform to provide service to commercial. non-profit and governmental organizations in Massachusetts, New Hampshire, New York and Rhode Island. Via wholesale agreements with Verizon, Sprint, Qwest, Global Crossing, PaeTec, Lightship, Thrive Networks and Amerivault, DSCI is able to provide local, long-distance. WAN, internet, systems integration and data recovery solutions for its customers.

4. DSCI will be forced to remove approximately 230 circuits for over 150 customers from the UNE Platform and from Verizon's surrogate UNE service unless the Federal Communications Commission ("FCC" or "Commission") stays the enterprise customer prohibition in the TRO. (DSCI has allowed Verizon to utilize a surrogate UNE service while they attempt to resolve operational issues on the UNE Platform.) These customers represent approximately 40% of DSCI's overall revenue and many years of hard work on the part of the DSCI team. Since this will affect DSCI's largest customers, it is impossible to calculate the immeasurable damage that will be done to DSCI's business if they are forced to endure a conversion to an alternative carrier or be subject to a draconian rate increase caused by the unavailability of ILEC provisioned unbundled local switching for these customers.

5. It is not technically, operationally or economically feasible for DSCI to locate alternative facilities or service arrangements and implement necessary changes to facilitate removal of all of its customers from the UNE Platform within 90 days.

6. Even if DSCI could complete these tasks, the ILECs do not have adequate hot cut capacity to process the necessary migrations, which creates an insurmountable disadvantage to DSCI. When hot cut capacity is insufficient, customers being migrated off of the UNE Platform frequently experience service disruptions. Customers who experience service disruptions typically blame their service provider, even though the service provider is not responsible for the service disruption. Customers who leave for this reason typically will not return. Consequently, DSCI potentially could forever lose many of its customers unless the enterprise customer prohibition is stayed. Indeed, enterprise customers are particularly sensitive to service disruptions, and thus many would return to the ILEC if they had any doubts about DSCI's continued ability to provide service.

7. The inability to maintain access to existing pricing while being unable to seamlessly transition customers to alternative providers will jeopardize DSCI's ability to remain a profitable on-going concern. A disruptive transition will expose DSCI to an untenable churn of our hard won base of customers. Additional hardship will be endured while DSCI forgoes significant growth opportunity while all available company resources are focused on the transition and retention of these existing customers. Management of this unanticipated and unfair transition of customers will eliminate any possibility of DSCI achieving its revenue growth goals. Verizon's ability to dramatically increase our rates for these services while we are in essence captives of their service will materially impact margins and profitability. This is clear impairment in that Verizon retail can win back these customers in a seamless manner. In light of the potential harm that DSCI faces, no monetary or other remedy would be remotely sufficient.

8 I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on this 18th day of September, 2003.

Dated: September 18, 2003

Sean Dandley

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Complainant Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)))	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)))	CC Docket No. 96-98
	)	
Deployment of Wireless Services Offering Advanced Telecommunications Capability	))	CC Docket No. 98-147

DECLARATION OF PETER KAROCZKAI

1. I, Peter Karoczkai, am the Senior VP of Sales and Marketing of InfoHighway Communications Corporation ("InfoHighway").

2. The purpose of my declaration is to provide evidentiary support for the Emergency Petition for Stay filed jointly by InfoHighway and Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications ("MetTel"). This petition requests stay of certain portions of the *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (FCC 03-36) released in the above-captioned proceedings on August 21, 2003 (hereinafter "Triennial Review Order" or "TRO"). In this declaration, I shall explain why failing to stay the enterprise customer prohibition will cause irreparable harm to InfoHighway. Among other things, lack of access to ILEC-provisioned unbundled local switching, in any geographic area, will materially diminish InfoHighway's ability to provide competitive telecommunications services.

3. InfoHighway is a leading Integrated Communications Provider ("ICP") offering end-to-end solutions including voice and data telecommunications and Internet services primarily to businesses in New York, New Jersey, Massachusetts, Pennsylvania, Delaware, Maryland, Washington, D.C., Virginia, Maine, New Hampshire, Vermont, Rhode Island, Connecticut and Texas. The Company offers "one-stop shopping" bundled options for local and long distance telephone services; high-speed data and Internet services, principally utilizing Digital Subscriber Line ("DSL") technology; web services, including web hosting; and network design and wiring services. InfoHighway offers unique and innovative solutions to small- to medium-sized businesses in combination with its voice services, such as state-of-the-art Voice Mail service with Unified Messaging capabilities.

4. InfoHighway will be forced to remove approximately 195 customers from the UNE Platform unless the Federal Communications Commission ("FCC" or "Commission") stays the enterprise customer prohibition in the TRO. These customers represent approximately 6% of InfoHighway's overall revenue.

5. Based on our past experiences, the ILECs in the states where we rely on the UNE Platform to provide service would not be able to handle the hot cuts necessary to remove InfoHighway's 195 customers from the UNE Platform even if InfoHighway were able to locate alternative facilities. As such, InfoHighway's customers most likely would face service disruptions if InfoHighway were forced to remove them from the UNE Platform within 90 days. When customers experience service disruptions, they typically blame their service provider, which means that InfoHighway likely would permanently lose any customers who experience service disruptions due to failures in the hot cut process.

6. The TRO created a tremendous competitive advantage for the ILECs (I.e. Verizon Communications, or "Verizon") against InfoHighway. The ILEC can move InfoHighway's existing customers back to its retail services (network) without any service interruption or any impact (by simply processing a "Record order" change), while InfoHighway can only "keep" their existing customers by moving them to an alternative network (whether their own or someone else's), which will cause severe service interruptions for the end-users. InfoHighway's customers include hospitals, medical centers, banks, universities, municipalities, hotels, and manufacturing facilities, for which service interruptions can be catastrophic. These services CANNOT be migrated to another network within 90 days for three main reasons: 1) the ILEC lacks the required processes, systems and methods and procedures ("M&Ps") to manage the migrations for the embedded customers in a seamless fashion (while Verizon can perform a seamless migration to its retail service with no service interruption). 2) the ILECs do not have the service and network configuration records needed to "recreate" the exact configuration of the embedded customers' circuits, and 3) it is physically impossible to provision NEW circuits for InfoHighway's embedded customers in such a short timeframe. If the existing customers want to retain their existing service configurations, and have uninterrupted service, then they MUST switch to the only alternative provider that can offer this, which is the ILEC (in our case, Verizon). On the other hand, if the embedded customers want to retain their services with InfoHighway, they must face lengthy service interruptions, inconvenient service configuration changes, and potential outages that may last days or weeks. One simple configuration change could render an embedded customer (a major hospital for example) completely out of service, as their Private Branch Exchange ("PBX") system becomes no longer compatible with the incoming circuit configuration. Most customers will not want to accept such risks, so InfoHighway is likely to lose their embedded bases in their entirety. In essence, the TRO "confiscates" InfoHighway's embedded base of customers and hands them to the ILEC on a silver platter.

7. No monetary or other remedy would be adequate to reverse the harm that InfoHighway will suffer unless the enterprise customer prohibition is stayed. Enterprise customers are particularly sensitive to service disruptions, and thus many would return to the ILEC if they had any doubts about InfoHighway's continued ability to provide service. There is NO established "hot cut" process for UNE Platform DS1 customers, the process simply does not exist. The ILEC's solution is to cut over these services by establishing redundant, new facilities and then manually migrate ("port") these customers over. This will always result in service interruptions for the end user customers. Verizon can easily convert these customers back to them since Verizon handles this conversion as a simple billing change with no service disruption. Enterprise customers will soon learn that when they return to Verizon for their DS1 Voice Services they will not experience any service disruption: thus, the customer will be more comfortable returning to Verizon and Verizon will ultimately benefit from this transaction.

8. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on this 22nd day of September, 2003.

Pete Karoczkai

Dated: September 22, 2003 Peter Karoczkai

DC01/DAUBT/210558.1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Complainant Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)))	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)))	CC Docket No. 96-98
	)	
Deployment of Wireless Services Offering Advanced Telecommunications Capability	))	CC Docket No. 98-147

DECLARATION OF DAVID ARONOW

1. I, Andoni Economou, am the President of Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications ("MetTel").

2. The purpose of my declaration is to provide evidentiary support for the Emergency Petition for Stay filed jointly by MetTel and InfoHighway Communications Corporation ("InfoHighway"). This petition requests stay of certain portions of the *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (FCC 03-36) released in the above-captioned proceedings on August 21, 2003 (hereinafter "Triennial Review Order" or "TRO"). In this declaration, I will explain why failing to stay the enterprise customer prohibition will cause irreparable harm to MetTel, in part because lack of access to ILEC-provisioned unbundled local switching, in any geographic area, will materially diminish MetTel's ability to provide competitive telecommunications service to the entire voice grade analog line market.

3. MetTel is a competitive local exchange carrier that serves small and medium businesses, residential subscribers and PSPs. To provide competitive telecommunications and information services to consumers, MetTel relies both on its own facilities and on leasing combinations of unbundled network elements of the incumbent local exchange carrier ("ILEC"). This latter method of providing facilities-based competitive service is sometimes referred to as the unbundled network element "platform" (the "UNE Platform"). MetTel has a broadband network in Manhattan, a significant UNE Platform customer base in Florida, Georgia, Massachusetts, New Jersey, New York, Pennsylvania and Texas, and operations in approximately 10 other states.

4. MetTel's customer base consists largely of business customers. MetTel also serves a significant number of residential customers: approximately 20-25 percent of total lines served. MetTel's business model requires it to increase its business consumer base as a percentage of the whole in order to continue servicing the residential market.

5. MetTel will be forced to remove approximately 100 customers from the UNE Platform unless the Federal Communications Commission ("FCC" or "Commission") stays the enterprise customer prohibition in the TRO. These customers generate approximately 6% of MetTel's overall revenues.

6. In any event, MetTel would not be able to locate alternative facilities or service arrangements and implement necessary changes within 90 days. The current transition period is too short to allow MetTel to complete the necessary business and operational plans and practices to account for the changed regulatory environment. Among other things, MetTel would have to (a) develop new manual UNE-L provisioning systems, including hiring, training, and equipping loop provisioning and switch technicians, (b) purchase and collocate new equipment, (c) create additional customer service and trouble maintenance groups, (d) revise wholesale billing systems, and (e) develop capabilities for E911 and local number portability.

7. Even if MetTel could complete these tasks, the ILECs do not have adequate hot cut capacity to process the necessary migrations, which creates an insurmountable disadvantage to MetTel.

8. The TRO places MetTel in a very real dilemma for which there is no adequate monetary or other remedy. MetTel is part of a sensitive industry in which public confidence in MetTel's continued ability to provide telecommunications services is especially important. If consumers have any doubts about MetTel's continued ability to provide telecommunications services, they will return to the ILEC in order to avoid potential service disruptions or inconveniences that could hurt their own businesses. Enterprise customers who experience a service disruption due to the enterprise customer prohibition will blame MetTel, which will therefore lose that customer forever even if a Court eventually overturns the enterprise customer prohibition.

9. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on this 18th day of September, 2003.

Dated: September 18, 2003

David Aronow